

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE JAMES HAYES,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 259299

Oakland Circuit Court

LC No. 04-196006-FH

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of pandering, MCL 750.455, and four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to 46 months to 20 years' imprisonment for his pandering conviction and to four terms of 20 to 50 years' imprisonment for his third-degree criminal sexual conduct convictions. We affirm.

Defendant first argues on appeal that the trial court abused its discretion by permitting the prosecutor to introduce evidence of defendant's prior acts to establish the existence of a scheme or plan of pandering. Defendant maintains that the prior-acts testimony presented by Juanita Edwards concerned matters that took place fourteen years ago and that were unconnected and dissimilar to the present case.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Crear*, 242 Mich App 158, 169; 618 NW2d 91 (2000). "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). If the reasons given by the trial court for its decision are inadequate or not legally recognized, then the trial court has abused its discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Three factors must be present for prior-acts evidence to be admissible under MRE 404(b)(1): (1) the evidence must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The victim engaged in sexual intercourse with defendant for a three-week period, and during that time she prostituted herself for defendant. Defendant met the victim while she was walking the streets and he offered her a place to stay. Defendant then asked the victim if she wanted to prostitute herself and she answered that she did. Defendant gave the victim some tips on to how to prostitute. Defendant also gave the victim some condoms and showed the victim where to go to find clients. Defendant stayed close to the victim to monitor her when she prostituted. Moreover, the victim gave all her prostitution earnings to defendant. Years earlier, Edwards also prostituted herself at a truck stop and gave her earnings to defendant pursuant to an agreement that she made with him. Edwards was homeless when she met defendant and she agreed to prostitute for defendant in exchange for drugs. Defendant also drove Edwards to the truck stop so she could engage in prostitution.

Despite defendant's contentions, there were sufficient similarities between Edwards and the victim's experiences with defendant to establish a pandering scheme or plan. MRE 404(b)(1). Both the victim and Edwards were homeless when they met defendant. Defendant entered into agreements with the victim and Edwards to engage in prostitution. Defendant provided Edwards with drugs in exchange for her prostitution earnings. Defendant provided the victim with housing, food, clothes, and other things during the three-week period that she stayed with and prostituted for him. Defendant took the victim and Edwards to their respective locations to engage in prostitution. Defendant drove the victim to a house to engage in her prostitution activities while Edwards was driven to a truck stop. Defendant provided both the victim and Edwards with drugs and both females gave defendant their earnings from their activities.

It was not an abuse of discretion for the court to find that even though the incidents occurred years apart, the evidence presented established a scheme or plan by which defendant engaged in pandering. The evidence presented by Edwards and the victim showed a scheme by which defendant sought out homeless females and helped them engage in prostitution. The prosecutor did not offer Edwards's testimony to prove defendant's propensity to commit the charged act but rather to show defendant's pandering scheme or plan. Edwards's testimony was offered for the proper purpose of establishing defendant's pandering plan or scheme, it was relevant to an issue of consequence at trial, and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. *Crear, supra* at 169-170. The trial court did not abuse its discretion by admitting the testimony.

Next, defendant argues that the trial court abused its discretion when it denied his motion for a mistrial, which was made because of an improper and prejudicial statement made by Detective Muir regarding defendant's parole status. "The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. . . . The trial court's ruling must be so grossly in error as to deprive the

defendant of a fair trial or amount to a miscarriage of justice.” *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Detective Muir’s statement regarding how he obtained defendant’s address – “I believe it was either in the report, or I received it from his parole officer at the time” – did not deny defendant a fair trial. Although Detective Muir’s statement was improper, any prejudicial effect that may have stemmed from the statement was cured with the court’s timely instruction to the jury to disregard the statement. Before testimony continued, the court promptly instructed the jury to disregard Detective Muir’s statement because it was untrue, and Detective Muir confirmed in the presence of the jury that the statement was false. The court specifically stated that defendant had not been on parole. Moreover, during jury instructions, the court instructed the jury that it should “make [its] decision only on the evidence that [the court] let in and nothing else.” “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the jury was properly instructed to disregard Detective Muir’s statement and there is a presumption that jurors follow the instructions given by the court, defendant has failed to show that the trial court abused its discretion in denying his motion for a mistrial.

Lastly, defendant argues that the prosecutor engaged in misconduct during closing arguments when he stated that defendant “sits here today because [he] is guilty of those crimes.” Defendant did not preserve this issue for appeal because he did not object to the prosecutor’s statement below. When issues of prosecutorial misconduct are not preserved, this Court reviews the record for plain error affecting substantial rights, and we will only reverse if the “error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant’s innocence.” *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). “[W]here a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal.” *Id.* at 449.

Issues of prosecutorial misconduct are considered “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court has found that “a prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *Ackerman*, *supra* at 450. This Court has also found that the “propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Viewed in context, the prosecutor’s remark was not improper. Although defendant argues that the prosecutor’s statement improperly injected his personal beliefs regarding defendant’s guilt or innocence, the record does not support this claim. The prosecutor did not imply that he had personal knowledge of defendant’s guilt, but, rather, that the evidence established defendant’s guilt. The prosecutor stated that defendant engaged in sexual acts with the fifteen-year-old victim for a three-week period. The prosecutor further argued that the police investigation confirmed that defendant engaged in sexual activities “through investigation with [sic] talking with other witnesses, and through finding evidence you can take back in the jury

room.” We conclude that the prosecutor sufficiently tied his “guilty” remark in with the evidence such that the remark did not constitute prosecutorial misconduct. “Placed in context, the prosecutor’s remark did not urge the jury to improperly suspend its own powers of critical analysis and judgment in deference to those of the . . . prosecutor, but rather urged the jury to resolve the case on the basis of reasoned consideration of the evidence” *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995) (internal citations and quotation marks omitted).

Moreover, the court instructed the jury that the lawyers’ statements and arguments were not evidence and that it should “only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge.” The trial court’s instruction was sufficient to eliminate any prejudice that may have stemmed from the prosecutor’s statement.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Patrick M. Meter